

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 245 of 2014

BETWEEN : **STEVEN PRADEEP SINGH**
First Plaintiff

: **FIJI LABOUR PARTY**
Second Plaintiff

AND : **ELECTORAL COMMISSION**
First Defendant

: **THE SUPERVISOR OF ELECTIONS**
Second Defendant

: **ATTORNEY GENERAL OF FIJI and MINISTER
OF ELECTIONS**
Third Defendant

BEFORE : Hon. Justice Kamal Kumar

DATE OF HEARING : 4 September 2014

DATE OF JUDGMENT : 10 September 2014

SOLICITORS : Mr A. K. Singh for the Plaintiffs
Mr S. N. Sharma, Mr M. Saneem, Ms M. Ram and
Ms S. Chand for the Second and Third
Defendants

JUDGMENT

1.0 Introduction

- 1.1 Notice of Originating Motion dated 25 August 2014 (hereinafter referred to as **“the Motion”**) was referred to me on 26 August 2014 when I directed it be listed at 9.30am on 29 August 2014.
- 1.2 On 29 August 2014, Second and Third Defendants filed Answering Affidavit of Mohammed Saneem, the Second Defendant (hereinafter referred to as **“SOE’s Affidavit”**).
- 1.3 When the Motion was called at 9.30am on 29 August 2014, Counsel for the Plaintiffs made an Application for matter to be stood down until 2.00pm to enable parties to discuss various issues that would be raised in Court.
- 1.4 By consent of the parties the Motion was stood down until 11.30am on the same day.
- 1.5 When the motion was re-called at 11.50am Mr Young, Counsel for Electoral Commission, the First Defendant submitted that the Declaration and Orders sought in prayers 1 to 6 of the Motion does not affect the First Defendant. Mr Young as Counsel for the First Defendant informed the Court that First Defendant will abide by any Orders Court may make in respect prayers 1 to 6 of the Motion. He then sought Courts leave for First Defendant’s presence to be excused in respect to prayers 1 to 6 of the Motion and any preliminary objections raised by Second and Third Defendants subject to First Defendant being given liberty to be heard in respect to prayers 7, 8 and 9 of the Motion if Court proceeds to hear submissions in respect to those prayers after determination of preliminary objections.
- 1.6 With no objection being raised by the Plaintiffs and Second and Third Defendants and in view of the Declarations and Orders sought in prayers 1 to 6 of the Motion, First Defendant’s presence was excused in respect to prayers 1 to 6 and preliminary objections to be raised by Second and Third Defendants.

1.7 Mr S. N. Sharma, leading Counsel for Second and Third Defendants raised following preliminary objection:-

- (i) Motion is irregular;
- (ii) This Court does not have jurisdiction to deal with Motion pursuant to s173(4)(d) as all reliefs sought are in breach of s173(4)(d);
- (iii) This case is moot as election process has moved from Sunday 24 August 2014 till Friday 29 August 2014;
- (iv) The issues raised are res-judicata as the issues have been dealt with in **Electoral Commission v. Supervisor of Elections** HBC Civil Action No. 240 of 2014.

1.8 After hearing brief oral submissions from Counsel for Plaintiffs and Second and Third Defendants I gave following directions:

- (i) Plaintiffs and Second and Third Defendants to file and serve Submissions on Preliminary Objections raised on behalf of Second and Third Defendants and substantive matter by 4.00pm on 2nd September, 2014;
- (ii) Any Reply to Submissions to be filed and served by 4.00pm on 3 September 2014;
- (iii) Hearing of Preliminary Objections and substantive matter be adjourned to 4 September 2014 at 10.00am.

1.9 Plaintiffs and Second and Third Defendants filed their Submissions as directed.

1.10 On 4 September 2014, the date of hearing, Plaintiffs by their Counsel submitted that in view of the nature of prayers 1 to 6 of the Motion there is a need for Electoral Commission, the First Defendant's presence and

contribution during the hearing of relief sought in prayers 1 to 6 of the Motion.

1.11 As a result by consent of the parties it was agreed that hearing on preliminary objections take place on 4 September 2014 and in the event the preliminary objections are disallowed then the substantive matter be listed for hearing on another day.

1.12 After hearing submissions on preliminary objections this matter was adjourned for Ruling on notice on the preliminary objections.

2.0 Background Facts

2.1 On or about 18 August 2014, party candidate nominations was filed by Second Plaintiff with Fijian Elections Office.

2.2 On the same day Supervisor of Elections wrote to the Second Plaintiff stating the status of rejected candidates which included the First Plaintiff.

2.3 On 19 August 2014, the Second Plaintiff appealed to the First Defendant on behalf of four of the rejected candidates including the First Plaintiff pursuant to Section 31(2) of the Electoral Decree 2014.

2.4 On 22 August 2014, the First Defendant allowed the appeal in respect to the First Plaintiff, and directed the Second Defendant to include First Plaintiff's name in the candidates list.

2.5 The Second Defendant refused to follow the directive of the First Defendant and drew the candidate list without First Plaintiff's name.

2.6 On 23 August 2014, First Defendant as Plaintiff filed Civil Action No. 240 of 2014 with Second Defendant as Defendant seeking certain declaration and orders one of which was that Second Defendant was bound to follow the directions of the First Defendant to include First Plaintiff's name in the candidate list.

2.7 On 24 August 2014, this Court delivered its Ruling in Civil Action No. 240 of 2014 when it was held that Second Defendant was not bound to follow directions of the First Defendant in respect to First Plaintiffs Appeal on the ground that First Defendant's decision was after the three day limit stated in s31(4) of the Electoral Decree 2014.

3.0 Preliminary Objections

3.1 Preliminary objections raised by Second and Third Defendants in their Submission are as follows:-

- (i) Irregularity of Plaintiff's Motion;
- (ii) Application is in breach of provision of s173(4)(d) of the Constitution of the Republic of Fiji;
- (iii) Prayers in Motion are moot given the steps taken for the election; and
- (iv) Issues in respect to prayers 1 to 6 of the Motion are res-judicata in light of the Court's ruling in **Electoral Commission v. Supervisor of Elections** [2014] Civil Action No. 240 of 2014 (24 August 2014).

Irregularity of Plaintiffs Motion

3.2 At prayer 1(a) of the Plaintiffs Motion Plaintiffs allege that *"purported action of the Second Defendant to proceed or disallow the First Plaintiff as candidate in forthcoming election infringed Plaintiffs right (a) to be a candidate for election to parliament as guaranteed under section 56(1) and (2) of the Constitution of the Republic of Fiji"*.

3.3 Also on page 6 of the Motion it is stated as follows:-

"This application for Constitutional Redress is brought pursuant to Section 56(1) and (2) of the Constitutional Redress Rules and the inherent jurisdiction of this Honourable Court."

3.4 Section 44(1) of the Constitution provides as follows:-

“s44.(1) If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.”

3.5 Pursuant to s44(1) of the Constitution the rights that can be enforced are rights guaranteed under Chapter 2 of the Constitution.

3.6 Rights guaranteed under Chapter 2 of the Constitution are:-

- (i) Right to life (s8);
- (ii) Right to personal liberty (s9);
- (iii) Right to be free from slavery, forced labour and human trafficking (s10);
- (iv) Freedom from cruel and degrading treatment (s11);
- (v) Freedom from unreasonable search and seizure (s12);
- (vi) Rights of arrested and detained persons (s13);
- (vii) Right of accused person (s14);
- (viii) Right to have access to courts or tribunals (s15);
- (ix) Right to Executive or administrative action and right to be given reason for such action (s16);
- (x) Freedom of speech, expression and publication (s17);
- (xi) Freedom of assembly (s18);
- (xii) Free of association (s19);
- (xiii) Right to fair employment practices to form or join trade unions (s20(1)(2));
- (xiv) Freedom of movement and residence (s21);
- (xv) Freedom of conscience and belief (s22);
- (xvi) Freedom to make political choices and right to form a political party, participate in the activities of or recruit members for a political party, free and fair elections (s23(1), (2));
- (xvii) For citizen who have reached 18 years right to be registered as a voter, right to vote under the Constitution, to be a candidate for

public office, or office within a political party of which the citizen is a member subject to satisfying any qualification for such office if elected to hold (s23(3);

- (xviii) Right to privacy (s24);
- (xix) Right to access to information (s25);
- (xx) Right to equality and freedom from discrimination (s26);
- (xxi) Freedom from compulsory or arbitrary acquisition of land (s27);
- (xxii) Rights of ownership and protection of iTaukei, Rotuman and Banaban Lands and not to be permanently alienated, whether by sale, grant, transfer or exchange except to the State in accordance with section 27 of the Constitution (s28);
- (xxiii) Protection of ownership and interests in land (s29);
- (xxiv) Right of landowners to fair share of royalties for extraction of minerals (s30);
- (xxv) Right to Education (S31);
- (xxvi) Right to economic participation (s32);
- (xxvii) Right to work and just minimum wages (s33);
- (xxviii) Right to reasonable access to transportation (s34);
- (xxix) Right to housing and sanitation (s35);
- (xxx) Right to adequate food and water (s36);
- (xxxi) Right to social security schemes (s37);
- (xxxii) Right to health (s38);
- (xxxiii) Freedom from arbitrary evictions (s39);
- (xxxiv) Right to clean and healthy environment (s40);
- (xxxv) Rights of children (s41);
- (xxxvi) Rights of persons with disabilities (s42).

3.7 Section 56 of the Constitution falls under Chapter 3 of the Constitution and not under Chapter 2.

3.8 I agree with Second and Third Defendants Submissions that constitutional redress under s44(1) of the Constitution is not available for alleged contravention of s56(1) and (2) of the Constitution and ss56(1) and (2) are procedural provisions.

- 3.9 In my opinion Plaintiff's application for constitutional redress as prayed for in prayer 1 of the Motion is irregular.
- 3.10 On the date of hearing Counsel for the Plaintiff in response to Second and Third Defendants Submissions sought leave to amend the Motion by deleting reference to ss56(1) and (2) of the Constitution and substituting it with s23 of the Constitution.
- 3.11 Counsel for the Plaintiffs submits that Second and Third Defendants will not be prejudiced as they already had notice of Plaintiffs submission on s23 of the Constitution and responded to it in their Reply to Plaintiffs Submission.
- 3.12 Whether this Court can allow the amendment or not will depend on Courts determination of the preliminary objection in respect to the issue of this Court's jurisdiction to deal with Motion in its original form.

Whether This Court Has Jurisdiction To Re-Grant Relief Prayed For In The Motion

- 3.13 Leading Counsel for the Second and Third Defendants submit that pursuant to s173(4)(d) of the Constitution this Court does not have jurisdiction to deal with the relief sought in prayers 1 to 9 of the Motion.
- 3.14 He further submits that since the Court does not have jurisdiction to deal with declaration sought in prayer 1 of the Motion, all other reliefs sought by the Plaintiffs which are contingent on the declaration in prayer 1 cannot be granted.
- 3.15 The determination on issue of jurisdiction pursuant to s173(4)(d) has been subject to two recent decisions of this Court being **Waqavonovono v. Chairperson of Electoral Commission and Others** Civil Action HBM 92 of 2014 and **Electoral Commission v. The Supervisor of Elections**.
- 3.16 Section 173(4) of the Constitution provides:-

*“(4) Notwithstanding anything contained in this Constitution, **no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceedings of any nature whatsoever which seeks or purports to challenge or question:***

(a) the validity or legality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;

(b) the constitutionality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under the Constitution;

(c) any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, for being inconsistent with any provision of this Constitution, including any provision of Chapter 2 of this Constitution; or

*(d) **any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken,** under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as any be made between 5*

December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.” (emphasis added)

3.17 Second and Third Defendants rely on s173(4)(d) of the Constitution which states that **“notwithstanding anything contained in”** the *Constitution* “no Court or tribunal shall have jurisdiction to accept, hear, determine or entertain or grant any Order relief or remedy in any proceedings of any nature whatsoever which seeks or purports to challenge or question:-

- (i) any decision made or authorised; or
- (ii) any action taken;
- (iii) any decision which may be made or authorised; or
- (iv) any action which may be taken

under any Promulgation, Decree or Declaration made between 5 October 2006 and first sitting of Parliament under the Constitution.

3.18 The only exception to exclusion of Courts jurisdiction in s173(4)(d) is that which is provided in the Promulgation or Decree itself.

3.19 Decision is defined in the Oxford Advanced Learners Dictionary of Current English 7th edition as **“a choice or judgment that you make after thinking and talking about what is the best thing to do.”**

3.20 The first part of declaration sought in prayer 1 of the Motion challenges the **“exclusion of First Plaintiff’s nomination by the Second Defendant in the list of candidates for national election scheduled for 17 September 2014.”**

3.21 To exclude First Plaintiff’s nomination is choice or judgment made by the Second Defendant and therefore falls within the definition of decision.

3.22 Prayer 2 of the Motion seeks declaration that the decision and the action of the First and Second Defendants adversely affected the Second Plaintiff.

3.23 The decision by the Second Defendant to exclude First Plaintiff's name from the candidate list for 2014 general election is a decision and action taken by Second Defendant in accordance with the provision of sections 6 and 36 of the Electoral Decree 2014 and therefore is subject to provision of s173(4)(d) of the Constitution.

3.24 Learned Counsel for the Plaintiffs submit that section 173(4)(d) of the Constitution should be read in the spirit of and subject to sections 3 and 23(1) and (2) of the Constitution.

3.25 Section 3-(1) of the Constitution provides as follows:-

“s3.-(1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.”

3.26 Section 23 of the Constitution provides as follows:-

“s23.-(1) Every citizen has the freedom to make political choices, and the right to-

- (a) form or join a political party;*
- (b) participate in the activities of, or recruit members for, a political party; and*
- (c) campaign for a political party, candidate or cause.*

(2) Every citizen has the right to free, fair and regular elections for any elective institution or office established under this Constitution.

(3) Every citizen who has reached the age of 18 years has the right-

- (a) to be registered as a voter;*

- (b) *to vote by secret ballot in any election or referendum under this Constitution;*
- (c) *to be a candidate for public office, or office within a political party of which the citizen is a member, subject to satisfying any qualifications for such an office; and*
- (d) *if elected, to hold office.*

(4) *A law may limit, or may authorise the limitation of, the rights mentioned in this section-*

- (a) *for the purpose of regulating the registration of voters, and prescribing persons who do not have or have ceased to have the right to be registered as a voter;*
- (b) *for the purpose of regulating the registration of political parties and prescribing persons who do not have the rights prescribed under subsection (1) and subsection (3)(c) and (d);*
- (c) *for the purpose of regulating persons who are not eligible to contest for a place in Parliament or in a public office, or an office within a political party; or*
- (d) *for the purpose of imposing restrictions on the holders of public offices (as defined in any such law) from the rights set out in this section.”*

3.27 Section 173(4) commences with the words **“Notwithstanding anything contained in this Constitution, ...”**

3.28 The word notwithstanding is defined in the Oxford Advanced Learners Dictionary of Current English 7th edition to mean **“without being affected by”**.

3.29 With all due respect to the Learned Counsel for the Plaintiffs I do not agree with his Submission that s173(4)(d) of the Constitution is subject to the provision of section 3 and 23 of the Constitution rather it is the contrary.

3.30 The motion also states that the Declaration/Orders in the Motion are sought under the inherent jurisdiction of this Court.

3.31 I quote the following passage from my judgment in **Waqavonovono v. Chairperson of Fijian Electoral Commission & Ors** Civil Action No. HBM 92 of 2014 (1st August 2014):-

“4.10 It must be noted that even though this court has unlimited original jurisdiction to hear and determine any civil or criminal proceeding under any law or matters arising under the Constitution or involving its interpretation as provided for in Section 100(3) and (4) of 2013 Constitution the jurisdiction to determine matters relating to election is special jurisdiction.

4.11 Jurisdiction/Power to determine the pre-election matters such as registration of voters, registration of political parties and nomination of candidate and so on are granted to Supervisor of Elections and Electoral Commission whereas jurisdiction to determine dispute post-election is granted to Court of Disputed Return which is the High Court of Fiji (Part 5 - Electoral Decree 2014).

4.12 In **Prasad v. Singh** [2002] FJHC 8:HBC 0 269 of 2011 (8 February 2002). His Lordship Justice Gates (as he then was) the current Chief Justice in dealing with post-election dispute stated as follows:

“It is clear the Court of Disputed Return exercise a special jurisdiction allowed by the Constitution and under the Electoral Act which legislation is in the nature of a code Osborne v, Shepherd [1981] 2 NSWLR 277 at p208G: **Josefa Rusaqoli v. Attorney - General & Anor.** (unreported) Suva High Court civil Action No. 0149 of 1994S; 6 June 1994 at p6.”

4.13 No jurisdiction has been granted to this court in respect to pre-election matters.

4.14 The rationale for the special jurisdiction is that matters relating to pre-election issue and post-election issue must be determined expeditiously. (see **Prasad v. Singh** supra)”

3.32 I must make it clear and put to rest that this Court does not have inherent jurisdiction to deal with matters relating to pre-election process and post-election matters. The jurisdiction to deal with matters relating to election are given to the Courts by the Electoral Decree 2014 and as such Court must exercise its powers within the confines of the Electoral Decree 2014 and the Regulations made under the Electoral Decree.

3.33 On the basis of what I said in **Waqavonovono's** case and preceding paragraph I hold that the prayers 1 and 2 of the Motion challenges or at best questions the decision and/or actions of the First and Second Defendants to exclude the name of the First Plaintiff from the candidates list for 2014 General Elections, and to proceed to complete the pre-election process.

3.34 Hence prayers 1 and 2 of the Motion are dismissed for want of jurisdiction.

3.35 As for the application by Plaintiffs Counsel to amend the Motion by deleting reference to s56(1) and (2) of the Constitution and substituting it with s23(1) of the Constitution I quote the following passage from **Waqavonovono's** case:-

“3.2 In **Ex-parte McCardle** 74 U.S (7 walls) 506 (1868) the Chief Justice of Supreme Court of United States stated as follows:

“Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.”

*In **Ex-parte McCardle** the congress enacted an Act granting several Court of the United States power to grant to writ of habeas corpus in all cases where persons liberty is restrained in violation of the Constitution. Final decision of any Court inferior to Circuit Court, may be appealed to Circuit Court of the United States of the District and from Judgment of the Circuit Court to the Supreme Court of the United States.*

Petitioner was held by military for trial before a military commission who caused writ of habeas corpus to be issued and upon hearing the petitioner, he was held in military custody. Petitioner appealed to Supreme Court and whilst the appeal was pending congress amended the above Act to remove the right to appeal to Supreme Court. Supreme Court of United State dismissed the appeal for want of jurisdiction.

3.3 *It is well established that if the Court does not have jurisdiction to grant relief sought then the matter ends at that point.*

3.4 In ***Padarath & Anor v. His Excellency the President of Fiji & Ors*** [2013] FJHC 116; HBC 33 of 2013 (14 March 2013) her Ladyship Justice Wati stated as follows:

“Whether the Court has powers to consider any proposed application for leave to amend the originating summons or give directions to the registry to accept the amended originating summons the Court must first establish that it has jurisdiction on the existing substantive cause. If the Court does not have any jurisdiction to hear the substantive cause, it cannot hear any oral or formal application for leave to amend. Hearing the application for leave to amend or giving directions for filing of amended process will tantamount to exercising of jurisdiction. It was therefore prudent that the preliminary issues on jurisdiction be heard and determined.”

3.5 In ***Padarath’s*** case the Plaintiff sought an injunction against Registrar of Political Parties from de-registering Fiji Labour Party under the Political Parties (Registration, Conduct and Disclosure Decree 2013). At the date of hearing of the Application for injunction Counsel for the Plaintiffs informed the Court that Plaintiffs intend to amend their Application and that Application to Amend has been filed in Court Registry.

At that point in time Counsel for the Defendants raised the issue that Court has to first decide the preliminary issue of jurisdiction and if Court holds that, it does not have jurisdiction to grant relief in the Original Application then it cannot allow the Amendment.”

3.36 Since this Court does not have jurisdiction to deal with prayers 1 and 2 of the Motion, Plaintiffs application to amend the Motion cannot be granted for lack of jurisdiction to deal with prayers in the Motion.

3.37 At prayer 3 of the Motion the Plaintiffs seek an order that Second Defendant *“perform his functions under the Electoral Decree 2014 as required by law and in particular to consider or reconsider the eligibility of the First Plaintiff to be a candidate in the elections for Parliament.”*

3.38 Section 8(b) of the Electoral Decree 2014 provides as follows:-

“8. In the performance of his or her functions and the exercise of his or her powers, the Supervisor is not subject to the direction or control by any person, except that he or she must comply with-

(a)

(b) a decision of a court of law exercising its jurisdiction in relation to a question on whether he or she has performed the functions or exercised the powers in accordance with the Constitution and the law, or whether he or she should or should not perform those functions or exercise those powers.”

3.39 The issue of excluding the Plaintiff’s name from the candidates list was canvassed in **Electoral Commission v. Supervisor of Elections** Civil Action No. 240 of 2014 (24 August 2014) and at paragraph 3.47 of my judgment in that case I stated as follows:-

“3.47 In respect to Mr Steven P. Singh’s appeal it is undisputed that Application for Appeal was received by the Commission at 1.50pm on 19 August 2014 and Commission issued the notification at 7.47pm on 22 August 2014 some 5 hour 57 minutes after the time for notification had expired. Hence, the Supervisor of Elections was not bound to follow the Commission’s directive in respect to Mr Singh’s nomination.”

3.40 It is undisputed that the 2nd Defendant had performed his functions that is required of him until date of hearing according to law and for this Court to order the Second Defendant to re-perform his functions will contravene s173(4)(d) of the Constitution.

3.41 For avoidance of doubt I must state that Court exercised its original jurisdiction in the case of **Electoral Commission v. Supervisor of Elections** under s100 of the Constitution only because of an impasse in respect to the issue as to when the time limit in section 30(5) and 31(4) of the Electoral Decree expired between First and Second Defendants the two independent bodies given jurisdiction to determine pre-election matters.

3.42 I uphold the Submissions of the Second and Third Defendants that since this Court does not have jurisdiction to deal with prayers 1 and 2 of the

Motion all other relief sought by Plaintiff in paragraphs 3 to 9 of the Motion cannot be granted for want of jurisdiction as the relief sought allegedly arises out of the decision and action of the First and Second Defendants.

3.43 Even though the relief sought by the Plaintiffs in the Motion cannot be granted for want of jurisdiction. I will make certain observations in respect to Third and Fourth Preliminary objections and other issues raised by the Counsel in relation to this Court's decision in **Electoral Commission v. Supervisor of Elections** (Supra) and Plaintiff's submissions by their Counsels to grant indemnity.

Issue Raised In Motion Are Moot

3.44 Second and Third Defendants by their leading Counsel submit that the issues raised by the Plaintiffs in the Motion are moot on the ground that various steps have been taken by the First and Second Defendants for election to take place.

3.45 At paragraph 24 of Second and Third Defendants submission they list the events that have taken place upto 29 August 2014 being date of swearing of SOE's Affidavit as follows:-

"24. (a) *The writ for the 2014 general elections provided for under the Constitution was issued on 4 August 2014 (referred to at paragraph 9);*

(b) *Nominations for candidates for the General Election to Parliament opened on 5 August 2014 and closed on 18 August 2014 (referred to at paragraph 10);*

(c) *Names of the candidates whose nominations were accepted were published in the Fiji Sun newspaper;*

(d) *Objections and Appeals ended on 22 August 2014 (referred to at paragraph 12);*

- (e) *National Candidates List was drawn on 23 August 2014 and was published in the Government Gazette, daily newspaper and broadcast on the radio and television on 24 August 2014 (referred to at paragraphs 13 and 14);*
- (f) *Notice of Poll and Notice of Pre-poll was also issued on 24 August 2014 (referred to at paragraphs 15-17 (inclusively));*
- (g) *Pre-polling will begin on Wednesday 3 September 2014 (referred to at paragraph 18);*
- (h) *On 25 August 2014, 715,000 ballot papers were printed and bound into booklets of 50 Ballot papers. Each ballot paper contains the number of 248 candidates (referred to at paragraph 19);*
- (i) *On 29 August 2014, the Fijian Elections Office began packing 10,000 postal vote envelopes to be sent by courier directly to every postal voter and the envelopes contain the ballot paper and the Voter Instruction Booklet (referred to at paragraph 20);*
- (j) *On 24 August 2014, 10,000 copies of the Voter Instruction Booklets were distributed locally and abroad and 600,000 Voter Instruction Booklets were printed for use on Saturday 30 August 2014 (referred to at paragraph 23);*
- (k) *As indicated in the Notice of Pre-poll issued under the Decree, actual voting by registered voters at pre-poll venues will commence on Wednesday 3 September 2014 and be completed in over 50 polling stations.”*

3.46 In addition to above actions leading Counsel for Second and Third Defendants informed the Court which fact was not disputed by Plaintiffs Counsel that postal and pre-polling was to take place at 76 centres on date of hearing.

3.47 Second and Third Defendants also submitted that if the orders sought were to be granted by this Court then:-

- “(a) a new writ for election of members of Parliament will need to be issued by the President;*
- (b) nominations of candidates for election to Parliament will need to be held, including an objection and appeals period;*
- (c) there will need to be a re-draw of the National Candidates List;*
- (d) the Notice of Poll and Pre-poll will need to be republished;*
- (e) the National Candidates List, ballot papers and Voter Instruction Booklets will need to be reprinted;*
- (f) Pre-poll and postal voters that have already cast their vote will need to vote again, etc.”*

3.48 Section 170 of the Constitution provides as follows:-

“s170.-(1) Notwithstanding anything contained in Chapter 4 of this Constitution, the first general election for members of Parliament under this Constitution shall be held on a date to be determined by the President, on the advice of the Prime Minister, provided however that the first general election must be held no later than 30 September 2014.

(2) For the first general election of members of Parliament under this Constitution, the date on which such general election shall be held shall be publicly announced by the President at least 60 days before the date of the general election.

(3) The writ for the first general election of members of Parliament under this Constitution shall be issued by the President on the advice of the Prime Minister, at least 44 days before the date of the general election.

(4) For the first general election of members of Parliament under this Constitution, the last day for the receipt of a nomination of a candidate for election to Parliament shall be 30 days before the date of the general election.

(5) Until such time the Electoral Commission or a Supervisor of Elections is appointed under this Constitution, the functions of the Electoral Commission or the Supervisor of Elections shall be performed by the Permanent Secretary responsible for elections.”

3.49 Leading Counsel for the Second and Third Defendants submits if the whole process is to be re-done then elections date of 17 September 2014 will need to be postponed and election will not be able to be held by 30 September 2014 as required by the Constitution.

3.50 Second and Third Defendants rely on the case of **Yabaki v. The President of the Republic of Fiji Islands** Civil Appeal No. 61 of 2001 (J) (14 February 2013) and **Sun Life Assurance of Canada v. Jervis** [1944] 1 ALLER 469.

3.51 In **Yabaki’s** case the Court of Appeal stated as follows:-

*“Even the recent line of authority on standing for declarations in public interest cases shows that there is normally to be sought from the Court a ruling on the legality of something live: either the Court is asked to declare illegal something which is to happen or to declare illegal something which has happened in circumstances, usually, where a return to the status quo is feasible, even although inconvenient. See **R v Trade Practices Tribunal : ex parte Tasmanian Breweries Ltd** (1970) 123 CLR 361, 374.”*

3.52 Given the events that have taken place it is my opinion that it is not feasible to wind back the election process to include First Plaintiff’s name in the list of candidates as polling by postal ballot and pre-polling have commenced and ballot papers have been printed. More so in view of s170(1) of the Constitution which requires election to be held no later than 30 September 2014.

3.53 It is also not in public interests to do so.

Whether Issues Raised Are Res Judicata

3.54 Second and Third Defendants have quoted the following commentary from Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata* 3rd edition 1996:

“19. A party setting up res judicata by way of estoppels as a bar to his opponent’s claim, or as the foundation of his own, must establish the constituent elements, namely:

- (i) the decision was judicial in the relevant sense;*
- (ii) it was in fact pronounced;*
- (iii) the tribunal had jurisdiction over the parties and the subject matter;*
- (iv) the decision was -*
 - (a) final, and*
 - (b) on the merits;*
- (v) it determined the same question as that raised in the later litigation; and*
- (vi) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem.”*

3.55 I accept the above statement as correct principle on issue res-judicata.

3.56 The decision in **Electoral Commission v. Supervisor of Elections** (Supra) determined the issue as when the time for determining objections and application for appeal to the Electoral Commission pursuant to the Electoral Decree expired.

3.57 It is my opinion that the Second and Third Defendants are correct in their Submissions that decision of when the time expired under s30(5) and 31(4) of Electoral Decree is decision in rem and has general application to all citizens of Fiji.

3.58 In my opinion if Court grants the Plaintiff’s relief sought then it could only do so on the basis that the First Defendant determined the First Plaintiff’s

appeal within prescribed time limit which will be contrary to the Court's decision in **Electoral Commission v. Supervisor of Elections**.

Section 51(1) of Interpretation Act

3.59 Counsel for the Plaintiff submit that decision in case of **Electoral Commission v. Supervisor of Elections** is wrong as it was made without reference to s51(a) of the Interpretation Act which provides as follows:-

“s51. In computing time for the purpose of any written law, unless a contrary intention appears-

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.”

3.60 It must be noted that in **Electoral Commission v. Supervisor of Elections** the parties were in agreement that time limit prescribed in s30(5) and s31(4) of the Electoral Decree expired on 22 August 2014 and only issue that was in dispute and called for Court's determination was whether time expired at 4.00pm on that day or at midnight.

3.61 It is interesting to note that on one hand Plaintiffs are stating that the decision in Civil Action No. 240 of 2014 is wrong and on the other hand is relying on the same decision to seek declaration that Plaintiff's right have been infringed. At lines 5, 6 and 7 of prayer 1 of the Motion Plaintiffs rely on *“failure of the First Defendant, the Electoral Commission (EC hereinafter) to deliver the Decision of the Review on appeal before the stipulated time on 22nd August 2014”* to seek declaration that Plaintiffs right has been infringed.

3.62 The reason for the Court's decision in Civil Action No. 240 of 2014 is stated in the Ruling delivered in the said action and it appears that parties to that proceedings have since 24 August 2014 continued with the election process on the basis of that decision.

Indemnity By Plaintiffs Through Their Counsel

3.63 Plaintiffs Counsel in his “bold” submission informed the Court that should the Court make declaration/order to include First Plaintiff’s name in the Candidates List and ballot papers from now onward Plaintiffs are prepared to give indemnity to Court on the form approved by the Court.

3.64 As indicated by the Plaintiffs Counsel this submission was indeed “bold”.

3.65 As indicated earlier this Court does not have inherent jurisdiction in relation to election matters and the Courts jurisdiction is given by the Electoral Decree, and Constitution.

3.66 Courts cannot bestow jurisdiction on itself when such jurisdiction is not granted to Courts by the Constitution, Decrees, Promulgation or Legislations on the basis of indemnity given by parties to Court proceeding.

4.0 Costs

On the issue of costs I take into consideration that parties filed submission and Reply to each other’s submissions. I also take into consideration the manner in which Counsel for parties co-operated with each other and the Court, during the Court proceedings.

5.0 Conclusion

5.1 I hold that this Court does not have jurisdiction to deal with the declaration and Order sought by the Plaintiffs in the Motion and as such the action is dismissed and struck out for want of jurisdiction.

5.2 I must emphasise that this Court’s decision does not determine the eligibility or ineligibility of First Plaintiff to be a candidate for 2014 General Elections as it is not the function of Court to do so.

5.3 I make following Orders:-

- (i) Plaintiffs Notice of Originating Motion dated 25 August 2014 and filed on 26 August 2014 is dismissed and struck out in its entirety.
- (ii) Plaintiffs do pay Second and Third Defendants costs in the sum of \$3,000.00 jointly.



At Suva

10 September 2014

Singh & Singh Lawyers for the Plaintiffs

Office of the Attorney General of Fiji for the Second and Third Defendants